

VIATICAL SETTLEMENTS

2003 GENERAL SESSION

STATE OF UTAH

This act modifies the Insurance Code by allowing viatical settlements regardless of whether the viator is terminally ill. The act provides for licensing and examinations of producers and providers of viatical settlements. The act provides guidelines in relation to viatical settlements for reporting, disclosure, advertising, fraud, and other general requirements. The act provides criminal penalties for violations. The act modifies the Securities Division - Real Estate Division Code by defining a viatical settlement interest as a security.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

31A-21-104, as last amended by Chapter 308, Laws of Utah 2002

31A-23-203, as last amended by Chapter 116, Laws of Utah 2001

31A-23-204, as last amended by Chapter 308, Laws of Utah 2002

61-1-13, as last amended by Chapter 160, Laws of Utah 1997

ENACTS:

31A-23-221, Utah Code Annotated 1953

31A-36-101, Utah Code Annotated 1953

31A-36-102, Utah Code Annotated 1953

31A-36-103, Utah Code Annotated 1953

31A-36-104, Utah Code Annotated 1953

31A-36-105, Utah Code Annotated 1953

31A-36-106, Utah Code Annotated 1953

31A-36-107, Utah Code Annotated 1953

31A-36-108, Utah Code Annotated 1953

31A-36-109, Utah Code Annotated 1953

31A-36-110, Utah Code Annotated 1953

31A-36-111, Utah Code Annotated 1953

31A-36-112, Utah Code Annotated 1953

31A-36-113, Utah Code Annotated 1953

32 **31A-36-114**, Utah Code Annotated 1953

33 **31A-36-115**, Utah Code Annotated 1953

34 **31A-36-116**, Utah Code Annotated 1953

35 **31A-36-117**, Utah Code Annotated 1953

36 **31A-36-118**, Utah Code Annotated 1953

37 **31A-36-119**, Utah Code Annotated 1953

38 *Be it enacted by the Legislature of the state of Utah:*

39 Section 1. Section **31A-21-104** is amended to read:

40 **31A-21-104. Insurable interest and consent.**

41 (1) (a) An insurer may not knowingly provide insurance to a person who does not have
42 or expect to have an insurable interest in the subject of the insurance.

43 (b) A person may not knowingly procure, directly, by assignment, or otherwise, an
44 interest in the proceeds of an insurance policy unless that person has or expects to have an
45 insurable interest in the subject of the insurance.

46 (c) Except as provided in Subsections (6), (7), and (8), any insurance provided in
47 violation of this Subsection (1) is subject to Subsection (5).

48 (2) As used in this chapter:

49 (a) (i) "Insurable interest" in a person means:

50 (A) for persons closely related by blood or by law, a substantial interest engendered by
51 love and affection; or

52 (B) in the case of other persons, a lawful and substantial interest in having the life,
53 health, and bodily safety of the person insured continue.

54 (ii) Policyholders in group insurance contracts do not need an insurable interest if
55 certificate holders or persons other than group policyholders who are specified by the
56 certificate holders are the recipients of the proceeds of the policies.

57 (iii) Each person has an unlimited insurable interest in the person's own life and health.

58 (iv) A shareholder or partner has an insurable interest in the life of other shareholders
59 or partners for purposes of insurance contracts that are an integral part of a legitimate buy-sell
60 agreement respecting shares or a partnership interest in the business.

61 (v) Subject to Subsection (9), an employer or an employer sponsored trust for the
62 benefit of the employer's employees:

(A) has an insurable interest in the lives of the employer's:

(I) directors;

(II) officers;

(III) managers;

(IV) nonmanagement employees; and

(V) retired employees; and

(B) may insure the lives listed in Subsection (2)(a)(v)(A):

(I) on an individual or group basis; and

(II) with the written consent of the insured.

(b) "Insurable interest" in property or liability means any lawful and substantial economic interest in the nonoccurrence of the event insured against.

(c) "Viatical settlement" ~~[means a written contract.]~~ is as defined in Section 31A-36-102.

~~[(i) entered into by a person who is the policyholder of a life insurance policy insuring the life of a terminally ill person;]~~

~~[(ii) under which the insured assigns, transfers ownership, irrevocably designates a specific person or otherwise alienates all control and right in the insurance policy to another person; and]~~

~~[(iii) the proceeds or a part of the proceeds of the contract is paid to the policyholder of the insurance policy or the policyholder's designee prior to the death of the subject.]~~

(3) (a) Except as provided in Subsection (4), an insurer may not knowingly issue an individual life or accident and health insurance policy to a person other than the one whose life or health is at risk unless that person, who is 18 years of age or older and not under guardianship under Title 75, Chapter 5, Protection of Persons Under Disability and Their Property, has given written consent to the issuance of the policy.

(b) A person shall express consent:

(i) by signing an application for the insurance with knowledge of the nature of the document; or

(ii) in any other reasonable way.

(c) Any insurance provided in violation of this Subsection (3) is subject to Subsection (5).

94 (4) (a) A life or accident and health insurance policy may be taken out without consent
95 in a circumstance described in this Subsection (4)(a).

96 (i) A person may obtain insurance on a dependent who does not have legal capacity.

97 (ii) A creditor may, at the creditor's expense, obtain insurance on the debtor in an
98 amount reasonably related to the amount of the debt.

99 (iii) A person may obtain life and accident and health insurance on an immediate
100 family member who is living with or dependent on the person.

101 (iv) A person may obtain an accident and health insurance policy on others that would
102 merely indemnify the policyholder against expenses the person would be legally or morally
103 obligated to pay.

104 (v) The commissioner may adopt rules permitting issuance of insurance for a limited
105 term on the life or health of a person serving outside the continental United States who is in the
106 public service of the United States, if the policyholder is related within the second degree by
107 blood or by marriage to the person whose life or health is insured.

108 (b) Consent may be given by another in a circumstance described in this Subsection
109 (4)(b).

110 (i) A parent, a person having legal custody of a minor, or a guardian of a person under
111 Title 75, Chapter 5, Protection of Persons Under Disability and Their Property, may consent to
112 the issuance of a policy on a dependent child or on a person under guardianship under Title 75,
113 Chapter 5, Protection of Persons Under Disability and Their Property.

114 (ii) A grandparent may consent to the issuance of life or accident and health insurance
115 on a grandchild.

116 (iii) A court of general jurisdiction may give consent to the issuance of a life or
117 accident and health insurance policy on an ex parte application showing facts the court
118 considers sufficient to justify the issuance of that insurance.

119 (5) (a) An insurance policy is not invalid because the policyholder lacks insurable
120 interest or because consent has not been given.

121 (b) Notwithstanding Subsection (5)(a), a court with appropriate jurisdiction may:

122 (i) order the proceeds to be paid to some person who is equitably entitled to the
123 proceeds, other than the one to whom the policy is designated to be payable; or

124 (ii) create a constructive trust in the proceeds or a part of the proceeds on behalf of

such a person, subject to all the valid terms and conditions of the policy other than those relating to insurable interest or consent.

(6) This section does not prevent any organization described under 26 U.S.C. Sec. 501(c)(3), (e), or (f), as amended, and the regulations made under this section, and which is regulated under Title 13, Chapter 22, Charitable Solicitations Act, from soliciting and procuring, by assignment or designation as beneficiary, a gift or assignment of an interest in life insurance on the life of the donor or assignor or from enforcing payment of proceeds from that interest.

(7) This section does not prevent:

(a) any policyholder of life insurance, whether or not the policyholder is also the subject of the insurance, from entering into a viatical settlement;

(b) any person from soliciting a person to enter into a viatical settlement; ~~or~~

(c) a person from enforcing payment of proceeds from the interest obtained under a viatical settlement~~[-]; or~~

(d) a provider of viatical settlements, a purchaser of a viatical settlement, a financing entity, a related provider trust, or a special purpose entity from executing any of the following with respect to the death benefit or ownership of any portion of a viaticated policy as provided for in Section 31A-36-109:

(i) an assignment;

(ii) a sale;

(iii) a transfer;

(iv) a devise; or

(v) a bequest.

(8) Notwithstanding Subsection (1), an insurer authorized under this title to issue a workers' compensation policy may issue a workers' compensation policy to a sole proprietorship, corporation, or partnership that elects not to include any owner, corporate officer, or partner as an employee under the policy even if at the time the policy is issued the sole proprietorship, corporation, or partnership has no employees.

(9) The extent of an employer's or employer sponsored trust's insurable interest for a nonmanagement and retired employee under Subsection (2)(a)(v) is limited to an amount commensurate with the employer's unfunded liabilities.

Section 2. Section **31A-23-203** is amended to read:

31A-23-203. General requirements for license issuance and renewal.

(1) The commissioner shall issue or renew a license to act as an agent, broker, or consultant to any person who, as to the license classification applied for under Section 31A-23-204:

(a) has satisfied the character requirements under Section 31A-23-205;

(b) has satisfied any applicable continuing education requirements under Section 31A-23-206;

(c) has satisfied any applicable examination requirements under Section 31A-23-207;

(d) has satisfied any applicable training period requirements under Section 31A-23-208;

(e) if a nonresident:

(i) has complied with Section 31A-23-209; and

(ii) holds an active similar license in that person's state of residence;

(f) as to applicants for licenses to act as title insurance agents, has satisfied the requirements of Section 31A-23-211; ~~and~~

(g) as to applicants for licenses to act as providers or producers of viatical settlements, has satisfied the requirements of Section 31A-23-221; and

~~[(g)]~~ (h) has paid the applicable fees under Section 31A-3-103.

(2) (a) This Subsection (2) applies to the following persons:

(i) an applicant for a pending producer's license; or

(ii) a licensed producer.

(b) A person described in Subsection (2)(a) shall report to the commissioner:

(i) any administrative action taken against the person:

(A) in another jurisdiction; or

(B) by another regulatory agency in this state; and

(ii) any criminal prosecution taken against the person in any jurisdiction.

(c) The report required by Subsection (2)(b) shall:

(i) be filed:

(A) at the time the person files the application for a producer's license; or

(B) within 30 days of the initiation of an action or prosecution described in Subsection

(2)(b); and

(ii) include a copy of the complaint or other relevant legal documents related to the action or prosecution described in Subsection (2)(b).

(3) (a) The department may request:

(i) criminal background information maintained pursuant to Title 53, Chapter 10, Part 2, from the Bureau of Criminal Identification; and

(ii) complete Federal Bureau of Investigation criminal background checks through the national criminal history system.

(b) Information obtained by the department from the review of criminal history records received under Subsection (3)(a) shall be used by the department for the purposes of:

(i) determining if a person satisfies the character requirements under Section 31A-23-205 for issuance or renewal of a license;

(ii) determining if a person has failed to maintain the character requirements under Section 31A-23-205; and

(iii) preventing persons who violate the federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. Secs. 1033 and 1034, from engaging in the business of insurance in the state.

(c) If the department requests the criminal background information, the department shall:

(i) pay to the Department of Public Safety the costs incurred by the Department of Public Safety in providing the department criminal background information under Subsection (3)(a)(i);

(ii) pay to the Federal Bureau of Investigation the costs incurred by the Federal Bureau of Investigation in providing the department criminal background information under Subsection (3)(a)(ii); and

(iii) charge the person applying for a license or for renewal of a license a fee equal to the aggregate of Subsections (3)(c)(i) and (ii).

Section 3. Section **31A-23-204** is amended to read:

31A-23-204. License classifications.

A resident or nonresident license issued under this chapter shall be issued under the classifications described under Subsections (1) through (6). These classifications are intended

218 to describe the matters to be considered under any education, examination, and training
219 required of license applicants under Sections 31A-23-206 through 31A-23-208.

220 (1) An agent and broker license classification includes:

221 (a) life insurance, including nonvariable contracts;

222 (b) variable contracts;

223 (c) accident and health insurance, including contracts issued to policyholders under
224 Chapter 7 or 8;

225 (d) property/liability insurance, which includes:

226 (i) property insurance;

227 (ii) liability insurance;

228 (iii) surety and other bonds; and

229 (iv) policies containing any combination of these coverages;

230 (e) title insurance under one of the following categories:

231 (i) search, including authority to act as a title marketing representative;

232 (ii) escrow, including authority to act as a title marketing representative;

233 (iii) search and escrow, including authority to act as a title marketing representative;

234 and

235 (iv) title marketing representative only;

236 (f) workers' compensation insurance; and

237 (g) personal lines.

238 (2) A limited license classification includes:

239 (a) limited line credit insurance;

240 (b) travel insurance;

241 (c) motor club insurance;

242 (d) car rental related insurance;

243 (e) legal expense insurance;

244 (f) bail bond agent; ~~and~~

245 (g) customer service representative[-]; and

246 (h) viatical settlements.

247 (3) A consultant license classification includes:

248 (a) life insurance, including nonvariable contracts;

249 (b) variable contracts;
250 (c) accident and health insurance, including contracts issued to policyholders under
251 Chapter 7 or 8;
252 (d) property/liability insurance, which includes:
253 (i) property insurance;
254 (ii) liability insurance;
255 (iii) surety and other bonds; and
256 (iv) policies containing any combination of these coverages; and
257 (e) workers' compensation insurance.
258 (4) A holder of licenses under Subsections (1)(a) and (1)(c) has all qualifications
259 necessary to act as a holder of a license under Subsection (2)(a).
260 (5) (a) Upon satisfying the additional applicable requirements, a holder of a brokers
261 license may obtain a license to act as a surplus lines broker.
262 (b) A license to act as a surplus lines broker gives the holder the authority to arrange
263 insurance contracts with unauthorized insurers under Section 31A-15-103, but only as to the
264 types of insurance under Subsection (1) for which the broker holds a brokers license.
265 (6) The commissioner may by rule recognize other agent, broker, limited license, or
266 consultant license classifications as to kinds of insurance not listed under Subsections (1), (2),
267 and (3).
268 Section 4. Section **31A-23-221** is enacted to read:
269 **31A-23-221. Special requirements for providers and producers of viatical**
270 **settlements.**
271 (1) Providers and producers of viatical settlements shall be licensed in accordance with
272 this title, with the additional requirements listed in this section.
273 (2) Providers of viatical settlements shall:
274 (a) provide a detailed plan of operation with their initial license application and with
275 each renewal application;
276 (b) if a legal entity, provide a certificate of good standing from the state of its domicile;
277 and
278 (c) provide an antifraud plan that meets the requirements of Section 31A-36-117.
279 (3) Providers and producers of viatical settlements shall provide with their initial

280 license application information describing their viatical settlement experience, training, and
281 education.

282 (4) A provider or producer of viatical settlements shall provide to the commissioner,
283 within 30 days after a change occurs, new or revised information concerning any of the
284 following:

- 285 (a) officers;
- 286 (b) holders of more than 10% of its stock;
- 287 (c) partners;
- 288 (d) directors;
- 289 (e) members; and
- 290 (f) designated employees.

291 Section 5. Section **31A-36-101** is enacted to read:

292 **CHAPTER 36. VIATICAL SETTLEMENTS ACT**

293 **31A-36-101. Title.**

294 This chapter is known as the "Viatical Settlements Act."

295 Section 6. Section **31A-36-102** is enacted to read:

296 **31A-36-102. Definitions.**

297 As used in this chapter:

- 298 (1) (a) "Advertising" means any communication placed before the public to:
 - 299 (i) create an interest in viatical settlements; or
 - 300 (ii) induce a person to sell a policy or an interest in a policy pursuant to a viatical
301 settlement.
- 302 (b) "Advertising" includes the following, if the requirements of Subsection (1)(a) are
303 met:
 - 304 (i) any written, electronic, or printed communication;
 - 305 (ii) any communication by means of recorded telephone messages;
 - 306 (iii) any communication transmitted on radio, television, the Internet, or similar
307 communications media; and
 - 308 (iv) film strips, motion pictures, and videos.
- 309 (2) "Business of viatical settlements" includes the following:
 - 310 (a) offering a viatical settlement;

311 (b) solicitation of a viatical settlement;

312 (c) negotiation of a viatical settlement;

313 (d) procurement of a viatical settlement;

314 (e) effectuation of a viatical settlement;

315 (f) purchasing a viatical settlement;

316 (g) investing in a viatical settlement;

317 (h) financing a viatical settlement;

318 (i) monitoring a viatical settlement;

319 (j) tracking a viatical settlement;

320 (k) underwriting a viatical settlement;

321 (l) selling a viatical settlement;

322 (m) transferring a viatical settlement;

323 (n) assigning a viatical settlement;

324 (o) pledging a viatical settlement; and

325 (p) otherwise hypothecating viatical settlements.

326 (3) "Chronically ill" means:

327 (a) being unable to perform at least two activities of daily living, such as eating,
328 toileting, moving from one place to another, bathing, dressing, or continence;

329 (b) requiring substantial supervision for protection from threats to health and safety
330 because of severe cognitive impairment; or

331 (c) having a level of disability similar to that described in Subsection (3)(a).

332 (4) (a) "Financing entity" means a person:

333 (i) that has direct ownership in a policy that is the subject of the viatical settlement;

334 (ii) whose principal activity related to the transaction is providing money to effect the
335 viatical settlement; and

336 (iii) that has an agreement in writing with one or more licensed providers of viatical
337 settlements to finance the acquisition of one or more viatical settlements.

338 (b) "Financing entity" includes, if the requirements of Subsection (5)(a) are met, the
339 following:

340 (i) an underwriter;

341 (ii) a placement agent;

(iii) an enhancer of credit;

(iv) a lender;

(v) a purchaser of securities; and

(vi) a purchaser of a policy from a provider of viatical settlements.

(c) "Financing entity" does not include a nonaccredited investor or a purchaser of viatical settlements.

(5) "Policy" means:

(a) an individual or group policy;

(b) a group certificate; or

(c) a contract or arrangement of life insurance, whether or not delivered or issued for delivery in Utah:

(i) affecting the rights of a resident of Utah; or

(ii) bearing a reasonable relation to Utah.

(6) (a) "Producer of viatical settlements" means a person that on behalf of a viator and for consideration offers or attempts to negotiate a viatical settlement between the viator and one or more providers of viatical settlements.

(b) "Producer of viatical settlements" does not include an attorney licensed to practice law in any state, certified public accountant, or financial planner accredited by a nationally recognized accrediting agency:

(i) that is retained by the viator; and

(ii) whose compensation is not paid directly or indirectly by a provider or purchaser of viatical settlements.

(7) (a) "Provider of viatical settlements" means a person other than a viator that enters into or effectuates a viatical settlement.

(b) "Provider of viatical settlements" does not include:

(i) a licensed lender that takes an assignment of a policy as security for a loan, including a:

(A) bank;

(B) savings bank;

(C) savings and loan association;

(D) credit union; or

(E) other licensed lender;
(ii) the issuer of a policy providing accelerated benefits pursuant to the policy;
(iii) an authorized or eligible insurer that provides stop-loss coverage to:
(A) a provider of viatical settlements;
(B) a purchaser of viatical settlements;
(C) a financing entity;
(D) a special purpose entity; or
(E) a related provider trust;
(iv) a natural person that enters or effectuates no more than one agreement in a
calendar year for the transfer of policies for a value less than the expected death benefit;
(v) a financing entity;
(vi) a special purpose entity;
(vii) a related provider trust;
(viii) a purchaser of viatical settlements; or
(ix) any of the following that purchases a viaticated policy from a provider of viatical
settlements:
(A) an accredited investor as defined in Regulation D, Rule 501, 17 C.F.R. Sec.
230.501; or
(B) a qualified institutional buyer as defined in Rule 144A, 17 C.F.R. Sec. 230.144A.
(8) (a) "Purchaser of viatical settlements" means a person that, to derive an economic
benefit:
(i) gives a sum of money as consideration for a policy or an interest in the death
benefits of a policy; or
(ii) owns, acquires, or is entitled to a beneficial interest in a trust that:
(A) owns a viatical settlement contract; or
(B) is the beneficiary of a policy that has been or will be the subject of a viatical
settlement.
(b) "Purchaser of viatical settlements" does not include:
(i) a licensee under this chapter;
(ii) an accredited investor as defined in Regulation D, Rule 501, 17 C.F.R. Sec.
230.501;

(iii) qualified institutional buyer as defined in Rule 144A, 17 C.F.R. Sec. 230.144A;

(iv) a financing entity;

(v) a special purpose entity; or

(vi) a related provider trust.

(9) "Related provider trust" means a trust established by a licensed provider of viatical settlements or a financing entity solely to hold the ownership of or beneficial interests in purchased policies in connection with financing.

(10) "Special purpose entity" means an organization formed by a licensed provider of viatical settlements solely to enable the provider to gain access to institutional markets for capital.

(11) "Terminally ill" means having a condition that reasonably may be expected to result in death within 24 months.

(12) (a) "Viatical settlement" means a written agreement for the payment of anything of value, which is less than the expected death benefit of the policy, in exchange for the viator's assignment, sale, transfer, devise, or bequest of the death benefit or ownership of any portion of a policy.

(b) "Viatical settlement" includes:

(i) an agreement with a viator for a loan or other financing secured primarily by a policy; and

(ii) an agreement with a viator to transfer ownership or change the beneficiary in the future, regardless of the date of payment to the viator.

(c) "Viatical settlement" does not include:

(i) a loan by an insurer pursuant to the terms of a policy; or

(ii) a loan secured by the cash value of a policy.

(13) "Viaticated policy" means a policy that has been acquired by a provider of viatical settlements pursuant to a viatical settlement.

(14) (a) "Viator" means any of the following that seeks to enter into a viatical settlement:

(i) the owner of a policy; or

(ii) the holder of a certificate of insurance under a policy of group insurance.

(b) "Viator" is not limited to a person that is terminally ill or chronically ill except

435 where that limitation is expressly provided.

436 (c) "Viator" does not include:

437 (i) a licensee under this chapter;

438 (ii) an accredited investor as defined in Regulation D, Rule 501, 17 C.F.R. Sec.

439 230.501;

440 (iii) qualified institutional buyer as defined in Rule 144A, 17 C.F.R. Sec. 230.144A;

441 (iv) a financing entity;

442 (v) a special purpose entity; or

443 (vi) a related provider trust.

444 Section 7. Section **31A-36-103** is enacted to read:

445 **31A-36-103. Law governing.**

446 If there is more than one viator on a single policy and the viators are residents of
447 different states, the law of the state in which the viator having the largest percentage ownership
448 resides governs the viatical settlement. If the viators own equal fractions of a policy, the
449 viators may agree in writing that the law of the state in which one resides governs the viatical
450 settlement.

451 Section 8. Section **31A-36-104** is enacted to read:

452 **31A-36-104. License requirements, revocation, and denial.**

453 (1) A person may not, without first obtaining a license from the commissioner, operate
454 in or from this state as a provider or producer of viatical settlements. Viatical settlements are
455 included within the scope of the life insurance producer line of authority.

456 (2) In addition to the requirements in Sections 31A-23-216 and 31A-23-217, the
457 commissioner may refuse to issue, suspend, revoke, or refuse to renew the license of a provider
458 or producer of viatical settlements if the commissioner finds that:

459 (a) a provider of viatical settlements demonstrates a pattern of unreasonable payments
460 to viators;

461 (b) the applicant or licensee, or an officer, partner, member, or key management
462 personnel:

463 (i) has, whether or not a judgment of conviction has been entered by the court, been
464 found guilty of, or pleaded guilty or nolo contendere to:

465 (A) a felony; or

(B) a misdemeanor involving fraud or moral turpitude; or

(ii) violated any provision of this chapter;

(c) a provider of viatical settlements has entered into a viatical settlement not approved under this chapter;

(d) a provider of viatical settlements has failed to honor obligations of a viatical settlement; or

(e) a provider of viatical settlements has assigned, transferred, or pledged a viaticated policy to a person other than:

(i) a provider of viatical settlements licensed under this chapter;

(ii) a purchaser of the viatical settlement;

(iii) an accredited investor as defined in Regulation D, Rule 501, 17 C.F.R. Sec. 230.501;

(iv) qualified institutional buyer as defined in Rule 144A, 17 C.F.R. Sec. 230.144A;

(v) a financing entity;

(vi) a special purpose entity; or

(vii) a related provider trust.

(3) If the commissioner denies a license application or suspends, revokes, or refuses to renew the license of a provider or producer of viatical settlements, the commissioner shall conduct an adjudicative proceeding under Title 63, Chapter 46b, Administrative Procedures Act.

Section 9. Section **31A-36-105** is enacted to read:

31A-36-105. Filing and use of forms for viatical settlement and disclosure.

(1) Unless the form has been filed with the commissioner under Subsection 31A-21-201(1), a person may not use a form for a:

(a) viatical settlement;

(b) disclosure to the viator;

(c) notice of intent to viaticate;

(d) verification of coverage; or

(e) application.

(2) The commissioner may prohibit the use of a form submitted under Subsection (1) pursuant to Subsection 31A-21-201(3).

497 (3) The commissioner may require the submission of advertising material before its
498 use.

499 Section 10. Section **31A-36-106** is enacted to read:

500 **31A-36-106. Reporting requirements and privacy.**

501 (1) Each licensee under this chapter shall file with the commissioner on or before
502 March 1 of each year an annual statement containing such information as the commissioner
503 prescribes under Section 31A-36-119, provided, however, that the information shall be limited
504 to those transactions where the viator is a resident of Utah.

505 (2) Except as otherwise allowed or required by law, the following may not disclose the
506 identity, financial information, or medical information of an insured to any other person:

507 (a) a provider of viatical settlements;

508 (b) a producer of viatical settlements;

509 (c) a producer of insurance;

510 (d) an information bureau;

511 (e) a rating agency or company; or

512 (f) any other person knowing the identity of an insured.

513 (3) Notwithstanding Subsection (2), a person may disclose the identity of an insured if
514 the disclosure is:

515 (a) necessary to effect a viatical settlement between the viator and a provider of viatical
516 settlements and both the viator and the insured have given prior written consent to the
517 disclosure;

518 (b) furnished in response to an investigation or examination by the commissioner or
519 another governmental officer or agency;

520 (c) furnished pursuant to Section 31A-36-114;

521 (d) a term of or condition to the transfer of a policy by one provider of viatical
522 settlements to another provider;

523 (e) necessary to permit a financing entity, related provider trust, or special purpose
524 entity to finance the purchase of a policy by a provider of viatical settlements and the insured
525 has given prior written consent to the disclosure;

526 (f) necessary to allow the provider or producer of viatical settlements or their
527 authorized representatives to make contacts to determine the health status of the viator; or

528 (g) required to purchase stop-loss coverage.

529 Section 11. Section **31A-36-107** is enacted to read:

530 **31A-36-107. Examinations and retention of records.**

531 (1) The commissioner may conduct an examination of a licensee under this chapter in
532 accordance with Sections 31A-2-203, 31A-2-203.5, 31A-2-204, and 31A-2-205.

533 (2) A person required to be licensed under this chapter shall retain for five years copies
534 of all:

535 (a) the following records, whether proposed, offered, or executed, from the date of the
536 proposal, offer, or execution, whichever is later:

537 (i) contracts;

538 (ii) purchase agreements;

539 (iii) underwriting documents;

540 (iv) policy forms; and

541 (v) applications;

542 (b) checks, drafts, and other evidence or documentation relating to the payment,
543 transfer, or release of money, from the date of the transaction; and

544 (c) records and documents related to the requirements of this chapter.

545 (3) This section does not relieve a person of the obligation to produce a document
546 described in Subsection (1) to the commissioner after the expiration of the relevant period if
547 the person has retained the document.

548 (4) Records required by this section to be retained must be legible and complete. They
549 may be retained in any form or by any process that accurately reproduces or is a durable
550 medium for the reproduction of the record.

551 (5) An examiner may not be appointed by the commissioner if the examiner, either
552 directly or indirectly, has a conflict of interest or is affiliated with the management of or owns a
553 pecuniary interest in any person subject to examination under this chapter. This section does
554 not automatically preclude an examiner from being:

555 (a) a viator;

556 (b) an insured in a viaticated policy; or

557 (c) a beneficiary in a policy that is proposed to be viaticated.

558 (6) (a) Examinees under this section shall reimburse the cost of any examination to the

department consistent with Section 31A-2-205.

(b) Notwithstanding Subsection (6)(a), individual producers of viatical settlements are not subject to Section 31A-2-205.

Section 12. Section **31A-36-108** is enacted to read:

31A-36-108. Required disclosures.

(1) With each application for a viatical settlement, a provider or producer of viatical settlements shall furnish to the viator any disclosures the commissioner may require under Section 31A-36-119, in a separate document signed by the viator and the provider or producer, no later than the time the application for the viatical settlement is signed by all the parties.

(2) A provider of viatical settlements shall furnish to the viator any disclosures the commissioner may require under Section 31A-36-119, conspicuously displayed in the viatical settlement or in a separate document signed by the viator and the provider of viatical settlements, no later than the time the viatical settlement is signed by all parties.

(3) (a) A person engaging in the business of life insurance shall provide a written notice to an owner of a policy that a viatical settlement is an available alternative transaction:

(i) if the owner of a policy requests from the person engaging in the business of life insurance:

(A) a surrender, in whole or in part, of a policy; or

(B) to receive an accelerated death benefit under a policy; or

(ii) under any circumstances as the commissioner may require under Section 31A-36-119.

(b) A person engaging in the business of life insurance shall provide the written notice required under Subsection (3)(a):

(i) within five business days after the day on which the person engaging in the business of life insurance receives a request described in Subsection (3)(a)(i); and

(ii) on a form approved by the commissioner under Section 31A-36-119.

Section 13. Section **31A-36-109** is enacted to read:

31A-36-109. General requirements.

(1) If a provider of viatical settlements transfers ownership or changes the beneficiary of a viaticated policy, the provider shall inform the insured of the transfer or change within 20 calendar days.

(2) A provider of viatical settlements that enters a viatical settlement shall first obtain:

(a) if the viator is the insured, a written statement from a licensed attending physician that the viator is of sound mind and under no constraint or undue influence to enter a viatical settlement;

(b) a witnessed document in which the viator represents that:

(i) the viator has a full and complete understanding of the viatical settlement and the benefits of the policy;

(ii) the viator has entered the viatical settlement freely and voluntarily; and

(iii) if applicable, the insured is terminally ill or chronically ill and that the illness was diagnosed after the policy was issued; and

(c) a document in which the insured consents to the release of the insured's medical records to:

(i) a provider of viatical settlements;

(ii) a producer of viatical settlements; and

(iii) the insurer that issued the policy covering the insured.

(3) Within 20 calendar days after a viator executes documents necessary to transfer rights under a policy, or enters into an agreement in any form, express or implied, to viaticate the policy, the provider of viatical settlements shall give written notice to the issuer of the policy that the policy has or will become viaticated. The notice must be accompanied by a copy of the documents required by Subsection (4).

(4) The provider of viatical settlements shall deliver a copy of the following to the insurer that issued the policy that is the subject of the viatical settlement:

(a) the medical release required under Subsection (2)(c);

(b) a copy of the viator's application for the viatical settlement; and

(c) the notice required under Subsection (3).

(5) The insurer shall complete and return a request for verification of coverage not later than 30 calendar days after the date the request is received. In its response the insurer shall indicate whether the insurer intends to pursue an investigation regarding the validity of the insurance contract.

(6) All medical information solicited or obtained by a licensee under this chapter is subject to:

621 (a) other laws of this state relating to the confidentiality of the information; and

622 (b) a rule relating to privacy of medical or personal information promulgated by the
623 commissioner under Title V, Section 505 of the Gramm-Leach-Bliley Act of 1999, 15 U.S.C.
624 Sec. 6805.

625 (7) A viatical settlement entered into in this state must reserve to the viator an
626 unconditional right to terminate the viatical settlement within 15 calendar days after the viator
627 receives the proceeds of the settlement. If the insured dies during that period, the settlement is
628 terminated and all proceeds, premiums, loans, and loan interest that have been paid by the
629 provider or purchaser of the viatical settlement must be repaid to the provider or purchaser of
630 the viatical settlement.

631 (8) (a) Contact with an insured to determine the health status of the insured after a
632 viatical settlement may be made only by a provider or producer of viatical settlements that is
633 licensed in this state, or its authorized representative, and no more than:

634 (i) once every three months if the insured has a life expectancy of one year or more; or

635 (ii) once every month if the insured has a life expectancy of less than one year.

636 (b) The provider or producer of viatical settlements shall explain the procedure for the
637 contacts allowed under this Subsection (8) to the viator when the application for the viatical
638 settlement is signed by all parties.

639 (c) The limitations of this Subsection (8) do not apply to contacts for purposes other
640 than determining health status.

641 (d) A provider or producer of viatical settlements is responsible for the acts of its
642 authorized representative in violation of this Subsection (8).

643 (9) The trustee of a related provider trust must agree in writing with the provider of
644 viatical settlements that:

645 (a) the provider is responsible for ensuring compliance with all statutory and regulatory
646 requirements; and

647 (b) the trustee will make all records and files related to viatical settlements available to
648 the commissioner as if those records and files were maintained directly by the provider.

649 (10) Regardless of the method of compensation, a producer of viatical settlements:

650 (a) represents only the viator; and

651 (b) owes a fiduciary duty to the viator to act according to the viator's instructions and in

the best interest of the viator.

Section 14. Section **31A-36-110** is enacted to read:

31A-36-110. Payment and document requirements.

(1) A provider of viatical settlements shall instruct the viator to send the executed documents required to effect the change in ownership or assignment or change of beneficiary of the affected policy to a designated independent escrow agent. Within three business days after the date the escrow agent receives the documents, or within three business days after the provider of viatical settlements receives the documents if by mistake they are sent directly to the provider of viatical settlements, the escrow agent shall deposit the proceeds of the settlement into an escrow or trust account maintained in a regulated financial institution whose deposits are insured by the Federal Deposit Insurance Corporation.

(2) Upon completion of the requirements of Subsection (1), the escrow agent shall deliver to the provider of viatical settlements the original documents executed by the viator. Upon the provider's receipt from the insurer of an acknowledgment of the change in ownership or assignment or change of beneficiary of the affected policy, the provider of viatical settlements shall instruct the escrow agent to pay the proceeds of the settlement to the viator.

(3) Payment to the viator must be made within three business days after the date the provider of viatical settlements received the acknowledgment from the insurer. Failure to make the payment within that time makes the viatical settlement voidable by the viator for lack of consideration until payment is tendered to and accepted by the viator.

Section 15. Section **31A-36-111** is enacted to read:

31A-36-111. Prohibited acts.

(1) A viator may not enter into a viatical settlement within two years after the date of issuance of the policy to which the settlement relates unless the viator certifies to the provider of viatical settlements that one of the following is satisfied:

(a) the policy was issued upon the viator's exercise of conversion rights arising out of a group or individual policy, provided:

(i) the total time covered under the conversion policy plus the time covered under the prior policy is at least 24 months; and

(ii) the time covered under a group policy, calculated without regard to any change in insurance carriers, has been continuous and under the same group sponsorship;

683 (b) the viator is a charitable organization exempt from taxation under 26 U.S.C. Sec.
684 501(c)(3);

685 (c) the viator is not a natural person; or

686 (d) the viator submits to the provider of viatical settlements independent evidence that
687 within the two-year period:

688 (i) the viator or insured is terminally ill;

689 (ii) the viator or insured is chronically ill;

690 (iii) the spouse of the viator has died;

691 (iv) the viator has divorced the viator's spouse;

692 (v) the viator has retired from full-time employment;

693 (vi) the viator has become physically or mentally disabled and a physician determines
694 that the disability precludes the viator from maintaining full-time employment;

695 (vii) (A) the viator was the employer of the insured when the policy or certificate was
696 issued; and

697 (B) the employment relationship has terminated;

698 (viii) a final judgment or order has been entered or issued by a court of competent
699 jurisdiction, on the application of a creditor of the viator:

700 (A) adjudging the viator bankrupt or insolvent;

701 (B) approving a petition for reorganization of the viator; or

702 (C) appointing a receiver, trustee, or liquidator for all or a substantial part of the
703 viator's assets;

704 (ix) the viator experiences a significant decrease in income that is unexpected and
705 impairs the viator's reasonable ability to pay the policy premium;

706 (x) the viator disposes of the viator's ownership in a closely held corporation; or

707 (xi) the insured disposes of the insured's ownership in a closely held corporation.

708 (2) When the provider of viatical settlements submits a request to the insurer to verify
709 coverage, the provider of viatical settlements shall submit to the insurer the following:

710 (a) copies of the independent evidence required under Subsection (1)(d); and

711 (b) documents required under Subsection 31A-36-109(2).

712 (3) If a provider of viatical settlements submits to an insurer a copy of the owner's or
713 insured's certification that one of the events described in Subsection (1)(d) has occurred, the

certification conclusively establishes that the viatical settlement satisfies the requirements of this section, and the insurer shall timely respond to the provider's request to effect a transfer of the policy.

Section 16. Section **31A-36-112** is enacted to read:

31A-36-112. Advertising regulations.

(1) (a) Each licensee under this chapter shall establish and continuously maintain a system of control over the content, form, and method of dissemination of all advertisements of its contracts and services.

(b) Each advertisement is the responsibility of the licensee as well as the person that creates or presents it.

(c) A system of control must include at least annual notification to persons authorized by the licensee that disseminate advertisements of the requirements and procedures for approval before use of any advertisements not furnished by the licensee.

(2) An advertisement must be truthful and not misleading in fact or by implication, as determined by the commissioner from the overall impression it may reasonably be expected to create upon a person of average education or intelligence in the segment of the public to which it is directed.

(3) False or misleading statements are not remedied by:

(a) making a viatical settlement available for inspection before it is consummated; or

(b) offering to refund payment if the viator is not satisfied within the period prescribed in Subsection 31A-36-109(7).

Section 17. Section **31A-36-113** is enacted to read:

31A-36-113. Fraud.

(1) As used in this section:

(a) "Recklessly" means engaging in conduct:

(i) in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks; and

(ii) involving a gross deviation from acceptable standards of conduct.

(2) A person may not, knowingly or with intent to defraud, to deprive another of property or for pecuniary gain, do or permit its employees or agents to engage in any of the following acts:

(a) present, cause to be presented or prepare with knowledge or belief that it will be presented, false information to or by a provider or producer of viatical settlements, a financing entity, an insurer, a provider of insurance or any other person, or to conceal information, as part of, in support of or concerning a fact material to:

(i) an application for the issuance of a policy or viatical settlement;

(ii) the underwriting of a policy or viatical settlement;

(iii) a claim for payment or other benefit under a policy or viatical settlement;

(iv) a premium paid on a policy;

(v) a payment or change of beneficiary or ownership pursuant to a policy or viatical settlement;

(vi) the reinstatement or conversion of a policy;

(vii) the solicitation, offer, effectuation, or sale of a policy or viatical settlement;

(viii) the issuance of written evidence of a policy or viatical settlement; or

(ix) a financing transaction;

(b) in furtherance of a fraud or to prevent detection of a fraud:

(i) remove, conceal, alter, destroy, or sequester from the commissioner assets or records of a licensee under this chapter or other person engaged in the business of viatical settlements;

(ii) misrepresent or conceal the financial condition of a licensee, a financing entity, an insurer, or other person;

(iii) transact the business of viatical settlements in violation of this chapter; or

(iv) file with the commissioner or analogous officer of another jurisdiction a document containing false information or otherwise conceal information about a material fact from the commissioner or analogous officer;

(c) embezzle, steal, misappropriate, or convert money, premiums, credits, or other property of a provider of viatical settlements, a viator, an insurer, an insured, an owner of a policy, or other person engaged in the business of viatical settlements or insurance;

(d) recklessly enter into, negotiate, or otherwise deal in a viatical settlement, the subject of which is a policy obtained where the viator or the viator's agent intended to defraud the policy's issuer by:

(i) presenting false information concerning any fact material to the policy; or

(ii) concealing, to mislead another, information concerning any fact material to the policy;

(e) attempt to commit, assist, aid, abet, or conspire to commit an act or omission described in this Subsection (2).

(3) A person may not knowingly or intentionally interfere with the enforcement of the provisions of this chapter or an investigation of a possible violation of this chapter.

(4) A person engaged in the business of viatical settlements may not knowingly or intentionally permit any person convicted of a felony involving dishonesty or breach of trust to participate in the business of viatical settlements.

(5) An application or contract for a viatical settlement, however transmitted, shall contain the following or a substantially similar statement: "A person that knowingly presents false information in an application for insurance or a viatical settlement is guilty of a crime and may be subject to fines and confinement in prison." The lack of such a statement is not a defense in a prosecution for violation of this section.

Section 18. Section **31A-36-114** is enacted to read:

31A-36-114. Reporting of fraud and immunity.

(1) A person engaged in the business of viatical settlements that knows or reasonably believes that a violation of Section 31A-36-113 is being, has been, or will be committed shall provide to the commissioner the information required by, and in a manner prescribed by, the commissioner.

(2) Any other person that knows or reasonably believes that a violation of Section 31A-36-113 is being, has been, or will be committed may furnish to the commissioner the information required by, and in a manner prescribed by, the commissioner.

(3) Except as provided in Subsection (4), a person furnishing information of the kind described in this section is immune from liability and civil action if the information is furnished to or received from:

(a) the commissioner or the commissioner's employees, agents, or representatives;

(b) federal, state, or local law enforcement or regulatory officials or their employees, agents, or representatives;

(c) another person involved in the prevention or detection of violations of Section 31A-36-113 or that person's employees, agents, or representatives;

(d) the following organizations or their employees, agents, or representatives:

(i) the National Association of Insurance Commissioners;

(ii) the National Association of Securities Dealers;

(iii) the North American Securities Administrators Association; or

(iv) another regulatory body overseeing life insurance, viatical settlements, securities, or investment fraud; or

(e) the insurer that issued the policy concerned in the information.

(4) The immunity provided in Subsection (3) does not extend to a statement made with actual malice. In an action brought against a person for filing a report or furnishing other information concerning a violation of this section, the plaintiff must plead specifically that the defendant acted with actual malice.

(5) A person identified in Subsection (3) shall be entitled to an award of attorney's fees and costs if:

(a) the person is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of activities in carrying out the provisions of this chapter; and

(b) the action did not have a reasonable basis in law or fact at the time it was initiated.

(6) This section does not supplant or modify any other privilege or immunity at common law or under another statute.

Section 19. Section **31A-36-115** is enacted to read:

31A-36-115. Confidentiality.

(1) The following shall be classified as protected records under Title 63, Chapter 2, Government Records Access and Management Act:

(a) a document or information furnished pursuant to Section 31A-36-114; and

(b) a document or information obtained by the commissioner in an investigation of a violation of Section 31A-36-113.

(2) Subsection (1) does not prohibit the commissioner from disclosing documents or evidence so furnished or obtained:

(a) in an administrative or judicial proceeding to enforce laws administered by the commissioner;

(b) to federal, state, or local law enforcement or regulatory agencies;

(c) to an organization established to detect and prevent fraudulent viatical settlement

838 acts;
839 (d) to the National Association of Insurance Commissioners; or
840 (c) to a person engaged in the business of viatical settlements that is aggrieved by the
841 violation.

842 (3) Disclosure of a document or evidence under Subsection (2) does not abrogate or
843 modify the privilege granted in Subsection (1).

844 Section 20. Section **31A-36-116** is enacted to read:

845 **31A-36-116. Other law enforcement or regulatory authority.**

846 This chapter does not:

847 (1) preempt the authority or relieve the duty of other law enforcement or regulatory
848 agencies to investigate, examine, and prosecute suspected violations of law;

849 (2) prevent or prohibit a person from disclosing voluntarily information concerning
850 viatical settlement fraud to a law enforcement or regulatory agency other than the insurance
851 department; or

852 (3) limit the powers granted elsewhere by law to the commissioner or an insurance
853 fraud unit to investigate and examine possible violations of law and to take appropriate action.

854 Section 21. Section **31A-36-117** is enacted to read:

855 **31A-36-117. Antifraud initiatives.**

856 (1) The following shall establish and maintain antifraud initiatives which are
857 reasonably calculated to prevent, detect, and assist in the prosecution of violations of Section
858 31A-36-113:

859 (a) a provider of viatical settlements; and

860 (b) an agency that is a producer of viatical settlements.

861 (2) The commissioner may order, or a licensee may request and the commissioner may
862 approve, modifications of the measures otherwise required under this section, more or less
863 restrictive than those measures, as necessary to protect against fraud.

864 (3) Antifraud initiatives shall include:

865 (a) fraud investigators, that may be either:

866 (i) employees of a provider or producer of viatical settlements; or

867 (ii) independent contractors;

868 (b) an antifraud plan submitted to the commissioner, which shall include:

(i) a description of the procedures for:

(A) detecting and investigating possible violations of Section 31A-36-113; and

(B) resolving material inconsistencies between medical records and applications for insurance;

(ii) a description of the procedures for reporting possible violations to the commissioner;

(iii) a description of the plan for educating and training underwriters and other personnel against fraud; and

(iv) a description or chart of the organizational arrangement of the personnel responsible for detecting and investigating possible violations of Section 31A-36-113 and for resolving material inconsistencies between medical records and applications for insurance.

(4) A plan submitted to the commissioner shall be classified as a protected record under Title 63, Chapter 2, Government Records Access and Management Act.

Section 22. Section **31A-36-118** is enacted to read:

31A-36-118. Criminal penalties and restitution.

(1) Persons subject to this chapter are subject to:

(a) the enforcement penalties and procedures of Section 31A-2-308 for administrative violations of this title;

(b) prosecution under Section 76-6-412 for criminal activities involving viatical settlements; or

(c) prosecution under Section 31A-31-103 for insurance fraud involving viatical settlements.

(2) A person found to be in violation of this chapter may:

(a) be ordered to pay restitution to persons aggrieved by the violation;

(b) be ordered to pay a forfeiture; or

(c) be imprisoned if found guilty of any criminal law by a court of competent jurisdiction.

Section 23. Section **31A-36-119** is enacted to read:

31A-36-119. Authority to promulgate rules.

The commissioner may adopt rules to:

(1) establish the requirements for the annual statement required under Section

- 900 31A-36-106;
- 901 (2) establish standards for evaluating the reasonableness of payments under viatical
- 902 settlements to persons chronically ill or terminally ill, including the regulation of the rates of
- 903 discount used to determine the amount paid in exchange for an assignment, transfer, sale,
- 904 devise, or bequest of a benefit under a policy;
- 905 (3) establish appropriate licensing requirements, fees, and standards for continued
- 906 licensure for providers and producers of viatical settlements;
- 907 (4) require a bond or otherwise ensure financial accountability of providers and
- 908 producers of viatical settlements;
- 909 (5) govern the relationship of insurers with providers and producers of viatical
- 910 settlements during the viatication of a policy;
- 911 (6) determine the specific disclosures, forms, and guidelines required under Section
- 912 31A-36-108;
- 913 (7) determine whether advertising for viatical settlements violates Section 31A-36-112;
- 914 and
- 915 (8) determine the information to be provided to the commissioner under Section
- 916 31A-36-114 and the manner of providing the information.
- 917 Section 24. Section **61-1-13** is amended to read:
- 918 **61-1-13. Definitions.**
- 919 As used in this chapter:
- 920 (1) "Affiliate" means a person that, directly or indirectly, through one or more
- 921 intermediaries, controls or is controlled by, or is under common control with a person
- 922 specified.
- 923 (2) "Agent" means any individual other than a broker-dealer who represents a
- 924 broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities.
- 925 "Agent" does not include an individual who represents:
- 926 (a) an issuer, who receives no commission or other remuneration, directly or indirectly,
- 927 for effecting or attempting to effect purchases or sales of securities in this state, and who:
- 928 (i) effects transactions in securities exempted by Subsection 61-1-14(1)(a), (b), (c), (i),
- 929 or (j);
- 930 (ii) effects transactions exempted by Subsection 61-1-14(2);

931 (iii) effects transactions in a covered security as described in Sections 18(b)(3) and
932 18(b)(4)(D) of the Securities Act of 1933; or

933 (iv) effects transactions with existing employees, partners, officers, or directors of the
934 issuer; or

935 (b) a broker-dealer in effecting transactions in this state limited to those transactions
936 described in Section 15(h)(2) of the Securities Exchange Act of 1934. A partner, officer, or
937 director of a broker-dealer or issuer, or a person occupying a similar status or performing
938 similar functions, is an agent only if he otherwise comes within this definition.

939 (3) "Broker-dealer" means any person engaged in the business of effecting transactions
940 in securities for the account of others or for his own account. "Broker-dealer" does not include:

941 (a) an agent;

942 (b) an issuer;

943 (c) a bank, savings institution, or trust company;

944 (d) a person who has no place of business in this state if:

945 (i) the person effects transactions in this state exclusively with or through:

946 (A) the issuers of the securities involved in the transactions;

947 (B) other broker-dealers; or

948 (C) banks, savings institutions, trust companies, insurance companies, investment
949 companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts,
950 or other financial institutions or institutional buyers, whether acting for themselves or as
951 trustees; or

952 (ii) during any period of 12 consecutive months the person does not direct more than
953 15 offers to sell or buy into this state in any manner to persons other than those specified in
954 Subsection (3)(d)(i), whether or not the offeror or any of the offerees is then present in this
955 state;

956 (e) a general partner who organizes and effects transactions in securities of three or
957 fewer limited partnerships, of which the person is the general partner, in any period of 12
958 consecutive months;

959 (f) a person whose participation in transactions in securities is confined to those
960 transactions made by or through a broker-dealer licensed in this state;

961 (g) a person who is a real estate broker licensed in this state and who effects

962 transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage
963 or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage,
964 deed or trust, or agreement, together with all the bonds or other evidences of indebtedness
965 secured thereby, is offered and sold as a unit;

966 (h) a person effecting transactions in commodity contracts or commodity options; or

967 (i) other persons as the division, by rule or order, may designate, consistent with the
968 public interest and protection of investors, as not within the intent of this Subsection (3).

969 (4) "Buy" or "purchase" means every contract for purchase of, contract to buy, or
970 acquisition of a security or interest in a security for value.

971 (5) "Commodity" means, except as otherwise specified by the division by rule:

972 (a) any agricultural, grain, or livestock product or byproduct, except real property or
973 any timber, agricultural, or livestock product grown or raised on real property and offered or
974 sold by the owner or lessee of the real property;

975 (b) any metal or mineral, including a precious metal, except a numismatic coin whose
976 fair market value is at least 15% greater than the value of the metal it contains;

977 (c) any gem or gemstone, whether characterized as precious, semi-precious, or
978 otherwise;

979 (d) any fuel, whether liquid, gaseous, or otherwise;

980 (e) any foreign currency; and

981 (f) all other goods, articles, products, or items of any kind, except any work of art
982 offered or sold by art dealers, at public auction or offered or sold through a private sale by the
983 owner of the work.

984 (6) "Commodity contract" means any account, agreement, or contract for the purchase
985 or sale, primarily for speculation or investment purposes and not for use or consumption by the
986 offeree or purchaser, of one or more commodities, whether for immediate or subsequent
987 delivery or whether delivery is intended by the parties, and whether characterized as a cash
988 contract, deferred shipment or deferred delivery contract, forward contract, futures contract,
989 installment or margin contract, leverage contract, or otherwise.

990 (a) Any commodity contract offered or sold shall, in the absence of evidence to the
991 contrary, be presumed to be offered or sold for speculation or investment purposes.

992 (b) (i) A commodity contract shall not include any contract or agreement which

requires, and under which the purchaser receives, within 28 calendar days from the payment in good funds any portion of the purchase price, physical delivery of the total amount of each commodity to be purchased under the contract or agreement.

(ii) The purchaser is not considered to have received physical delivery of the total amount of each commodity to be purchased under the contract or agreement when the commodity or commodities are held as collateral for a loan or are subject to a lien of any person when the loan or lien arises in connection with the purchase of each commodity or commodities.

(7) (a) "Commodity option" means any account, agreement, or contract giving a party to the option the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise.

(b) It does not include an option traded on a national securities exchange registered with the United States Securities and Exchange Commission or on a board of trade designated as a contract market by the Commodity Futures Trading Commission.

(8) "Director" means the director of the Division of Securities charged with the administration and enforcement of this chapter.

(9) "Division" means the Division of Securities established by Section 61-1-18.

(10) "Executive director" means the executive director of the Department of Commerce.

(11) "Federal covered adviser" means a person who is registered under Section 203 of the Investment Advisers Act of 1940 or is excluded from the definition of "investment adviser" under Section 202(a)(11) of the Investment Advisers Act of 1940.

(12) "Federal covered security" means any security that is a covered security under Section 18(b) of the Securities Act of 1933 or rules or regulations promulgated thereunder.

(13) "Fraud," "deceit," and "defraud" are not limited to their common-law meanings.

(14) "Guaranteed" means guaranteed as to payment of principal or interest as to debt securities, or dividends as to equity securities.

(15) (a) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who,

1024 for compensation and as a part of a regular business, issues or promulgates analyses or reports
1025 concerning securities.

1026 (b) "Investment adviser" also includes financial planners and other persons who, as an
1027 integral component of other financially related services, provide the foregoing investment
1028 advisory services to others for compensation and as part of a business or who hold themselves
1029 out as providing the foregoing investment advisory services to others for compensation.

1030 (c) "Investment adviser" does not include:

1031 (i) an investment adviser representative;

1032 (ii) a bank, savings institution, or trust company;

1033 (iii) a lawyer, accountant, engineer, or teacher whose performance of these services is
1034 solely incidental to the practice of his profession;

1035 (iv) a broker-dealer or its agent whose performance of these services is solely
1036 incidental to the conduct of its business as a broker-dealer and who receives no special
1037 compensation for them;

1038 (v) a publisher of any bona fide newspaper, news column, news letter, news magazine,
1039 or business or financial publication or service, of general, regular, and paid circulation, whether
1040 communicated in hard copy form, or by electronic means, or otherwise, that does not consist of
1041 the rendering of advice on the basis of the specific investment situation of each client;

1042 (vi) any person who is a federal covered adviser; or

1043 (vii) such other persons not within the intent of this Subsection (15) as the division
1044 may by rule or order designate.

1045 (16) "Investment adviser representative" means any partner, officer, director of, or a
1046 person occupying a similar status or performing similar functions, or other individual, except
1047 clerical or ministerial personnel, who:

1048 (a) (i) is employed by or associated with an investment adviser who is licensed or
1049 required to be licensed under this chapter; or

1050 (ii) has a place of business located in this state and is employed by or associated with a
1051 federal covered adviser; and

1052 (b) does any of the following:

1053 (i) makes any recommendations or otherwise renders advice regarding securities;

1054 (ii) manages accounts or portfolios of clients;

- 1055 (iii) determines which recommendation or advice regarding securities should be given;
1056 (iv) solicits, offers, or negotiates for the sale of or sells investment advisory services; or
1057 (v) supervises employees who perform any of the foregoing.
- 1058 (17) (a) "Issuer" means any person who issues or proposes to issue any security or has
1059 outstanding a security that it has issued.
- 1060 (b) With respect to a preorganization certificate or subscription, "issuer" means the
1061 promoter or the promoters of the person to be organized.
- 1062 (c) With respect to:
- 1063 (i) interests in trusts, including but not limited to collateral trust certificates, voting
1064 trust certificates, and certificates of deposit for securities; or
- 1065 (ii) shares in an investment company without a board of directors, "issuer" means the
1066 person or persons performing the acts and assuming duties of a depositor or manager under the
1067 provisions of the trust or other agreement or instrument under which the security is issued.
- 1068 (d) With respect to an equipment trust certificate, a conditional sales contract, or
1069 similar securities serving the same purpose, "issuer" means the person by whom the equipment
1070 or property is to be used.
- 1071 (e) With respect to interests in partnerships, general or limited, "issuer" means the
1072 partnership itself and not the general partner or partners.
- 1073 (f) With respect to certificates of interest or participation in oil, gas, or mining titles or
1074 leases or in payment out of production under the titles or leases, "issuer" means the owner of
1075 the title or lease or right of production, whether whole or fractional, who creates fractional
1076 interests therein for the purpose of sale.
- 1077 (18) "Nonissuer" means not directly or indirectly for the benefit of the issuer.
- 1078 (19) "Person" means an individual, a corporation, a partnership, a limited liability
1079 company, an association, a joint-stock company, a joint venture, a trust where the interests of
1080 the beneficiaries are evidenced by a security, an unincorporated organization, a government, or
1081 a political subdivision of a government.
- 1082 (20) "Precious metal" means the following, whether in coin, bullion, or other form:
- 1083 (a) silver;
- 1084 (b) gold;
- 1085 (c) platinum;

1086 (d) palladium;
1087 (e) copper; and
1088 (f) such other substances as the division may specify by rule.

1089 (21) "Promoter" means any person who, acting alone or in concert with one or more
1090 persons, takes initiative in founding or organizing the business or enterprise of a person.

1091 (22) (a) "Sale" or "sell" includes every contract for sale of, contract to sell, or
1092 disposition of, a security or interest in a security for value.

1093 (b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or
1094 solicitation of an offer to buy, a security or interest in a security for value.

1095 (c) The following are examples of the definitions in Subsections (22)(a) and (b):

1096 (i) any security given or delivered with or as a bonus on account of any purchase of a
1097 security or any other thing, is part of the subject of the purchase, and has been offered and sold
1098 for value;

1099 (ii) a purported gift of assessable stock is an offer or sale as is each assessment levied
1100 on the stock;

1101 (iii) an offer or sale of a security that is convertible into, or entitles its holder to acquire
1102 or subscribe to another security of the same or another issuer is an offer or sale of that security,
1103 and also an offer of the other security, whether the right to convert or acquire is exercisable
1104 immediately or in the future;

1105 (iv) any conversion or exchange of one security for another shall constitute an offer or
1106 sale of the security received in a conversion or exchange, and the offer to buy or the purchase
1107 of the security converted or exchanged;

1108 (v) securities distributed as a dividend wherein the person receiving the dividend
1109 surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or
1110 sale;

1111 (vi) a dividend of a security of another issuer is an offer or sale; or

1112 (vii) the issuance of a security under a merger, consolidation, reorganization,
1113 recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the
1114 security issued as well as the offer to buy or the purchase of any security surrendered in
1115 connection therewith, unless the sole purpose of the transaction is to change the issuer's
1116 domicile.

- 1117 (d) The terms defined in Subsections (22)(a) and (b) do not include:
- 1118 (i) a good faith gift;
- 1119 (ii) a transfer by death;
- 1120 (iii) a transfer by termination of a trust or of a beneficial interest in a trust;
- 1121 (iv) a security dividend not within Subsection (22)(c)(v) or (vi);
- 1122 (v) a securities split or reverse split; or
- 1123 (vi) any act incident to a judicially approved reorganization in which a security is
- 1124 issued in exchange for one or more outstanding securities, claims, or property interests, or
- 1125 partly in such exchange and partly for cash.
- 1126 (23) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility
- 1127 Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal
- 1128 statutes of those names as amended before or after the effective date of this chapter.
- 1129 (24) (a) "Security" means any:
- 1130 (i) note;
- 1131 (ii) stock;
- 1132 (iii) treasury stock;
- 1133 (iv) bond;
- 1134 (v) debenture;
- 1135 (vi) evidence of indebtedness;
- 1136 (vii) certificate of interest or participation in any profit-sharing agreement;
- 1137 (viii) collateral-trust certificate;
- 1138 (ix) preorganization certificate or subscription;
- 1139 (x) transferable share;
- 1140 (xi) investment contract;
- 1141 (xii) burial certificate or burial contract;
- 1142 (xiii) voting-trust certificate;
- 1143 (xiv) certificate of deposit for a security;
- 1144 (xv) certificate of interest or participation in an oil, gas, or mining title or lease or in
- 1145 payments out of production under such a title or lease;
- 1146 (xvi) commodity contract or commodity option;
- 1147 (xvii) interest in a limited liability company; ~~[or]~~

1148 (xviii) viatical settlement interest; or
1149 ~~[(xviii)]~~ (xix) in general, any interest or instrument commonly known as a "security,"
1150 or any certificate of interest or participation in, temporary or interim certificate for, receipt for,
1151 guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

1152 (b) "Security" does not include any:

1153 (i) insurance or endowment policy or annuity contract under which an insurance
1154 company promises to pay money in a lump sum or periodically for life or some other specified
1155 period; or

1156 (ii) interest in a limited liability company in which the limited liability company is
1157 formed as part of an estate plan where all of the members are related by blood or marriage,
1158 there are five or fewer members, or the person claiming this exception can prove that all of the
1159 members are actively engaged in the management of the limited liability company. Evidence
1160 that members vote or have the right to vote, or the right to information concerning the business
1161 and affairs of the limited liability company, or the right to participate in management, shall not
1162 establish, without more, that all members are actively engaged in the management of the
1163 limited liability company.

1164 (25) "State" means any state, territory, or possession of the United States, the District
1165 of Columbia, and Puerto Rico.

1166 (26) (a) "Viatical settlement interest" means the entire interest or any fractional interest
1167 in any of the following that is the subject of a viatical settlement:

1168 (i) a life insurance policy; or

1169 (ii) the death benefit under a life insurance policy.

1170 (b) "Viatical settlement interest" does not include the initial purchase from the viator
1171 by a provider of viatical settlements.

1172 ~~[(26)]~~ (27) "Working days" means 8 a.m. to 5 p.m., Monday through Friday, exclusive
1173 of legal holidays listed in Section 63-13-2.

1174 ~~[(27)]~~ (28) A term not defined in Section 61-1-13 shall have the meaning as established
1175 by division rule. The meaning of a term neither defined in this section nor by rule of the
1176 division shall be the meaning commonly accepted in the business community.

Legislative Review Note
as of 8-26-02 10:13 AM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel